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Howard, Erica ORCID: <https://orcid.org/0000-0003-0848-5033> (2021) Headscarves and the CJEU: protecting fundamental rights or pandering to prejudice. Maastricht Journal of European and Comparative Law . ISSN 1023-263X [Article] (Accepted/In press)

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Headscarves and the CJEU: protecting fundamental rights or pandering to prejudice

Abstract

This article examines the Opinion of AG Rantos in two cases concerning Islamic headscarves before the CJEU and argues that this Opinion appears to give almost carte blanche to (private) employers to adopt neutrality policies in their workplaces based on the wishes of their customers. In doing so, the AG appears to allow employers to pander to the prejudices of their customers and to push believers, and especially Muslim women, even further out of sight. It is argued that this affects not only the employment opportunities, but also the social inclusion of people from groups especially vulnerable to discrimination and that this goes against the founding values of the EU. The CJEU now has a choice: it can choose to protect the fundamental rights of religious minorities by taking these rights into account when assessing the two cases before it, or it can allow employers to pander to the prejudice of customers against people from religious minorities.

Key words

Islamic headscarves, religious discrimination, equal treatment, staff regulations, private sector.

1 Introduction

On 25 February 2021, Advocate General (AG) Rantos delivered his opinion in two cases before the Court of Justice of the European Union (CJEU) regarding the wearing of Islamic headscarves at work, both originating from German national courts.¹ These cases were allocated to former AG Sharpston in 2019, but after her departure from office in September 2020, they were reallocated to her successor, AG Rantos. However, because AG Sharpston and her team had already done much of the work for the

¹ Opinion of Advocate General Rantos in Joined Cases C-804/18 *IX v. Wabe eV* and C-341/19 *MH Müller Handels GmbH v. MJ*, EU:C:2021:144. On these preliminary references see: E. Howard, 'Headscarves Return to the CJEU: Unfinished Business', 27, 1 *Maastricht Journal of European and Comparative Law* (2019) p 10-28.

Opinion, she wrote a Shadow Opinion as a contribution to the debate about ‘an important and sensitive’ topic.² These two Opinions are very different and come to opposite conclusions in relation to religious discrimination, possible justifications which employers can bring forward for discriminatory work rules, the scrutiny such justifications needs to be subjected to by courts and what needs to be taken into account in this.

AG Rantos’ Opinion suggests that a private employer can adopt a policy of political, philosophical and religious neutrality in the workplace in order to take account of the wishes of their customers, even if this means that employees cannot manifest their religion or belief at work by the wearing of clothing which they consider to be mandated by that religion. According to AG Rantos, the employee’s right to freely manifest their religion under Article 10 of the of the EU Charter of Fundamental Rights (Charter) cannot be taken into account when assessing whether such a rule, although indirectly discriminatory, is objectively justified. This Opinion goes beyond what the CJEU decided in two earlier case concerning headscarves at work and appears to push people from religious minorities, and in particular Muslim women, even further out of sight. In *Achbita*, the CJEU held, in relation to the justification test for indirect discrimination, that a neutrality policy was a legitimate aim as it was part of the freedom to conduct a business, guaranteed by Article 16 of the Charter.³ AG Rantos adds that this can be in order to take account of customers’ wishes. However, this was not mentioned by the CJEU in *Achbita*, while in a case decided on the same day, *Bougnaoui*, the CJEU held that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement.⁴ In *Achbita*, the CJEU also considered it important that the neutrality policy should only apply to employees who interact with customers.⁵ The CJEU was criticised for restricting not only the

² E. Sharpston, ‘Shadow Opinion of Former Advocate General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)’, *EU Law Analysis*, 23 March 2021, <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>

³ Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4 S Secure Solutions NV*, EU:C:2017:203, para. 37-38.

⁴ Case C-188/15 *Asma Bougnaoui, Association de Defense des Droits de l’Homme (ADDH) v. Micropole Univers SA*, EU:C:2017:204, para. 40-41.

⁵ Case C-157/15 *Achbita*, para. 42

employment opportunities, but also the broader inclusion of a large group of people from religious minorities.⁶ AG Rantos Opinion seems to restrict this even further.

It will be argued that, if the CJEU follows the Opinion of AG Rantos, it risks making a populist decision, allowing employers to pander to the prejudice of the majority in society against people from religious minorities. This would lead to even more social exclusion of those groups which are already vulnerable to discrimination because of prejudice and stereotypes. Bans on the wearing of headscarves would have a particularly disadvantageous effect on the employment prospects and the participation in society of Muslim women. This would go against the values of the EU such as respect for human dignity, equality and human rights, including the rights of persons belonging to minorities, as laid down in Article 2 of the Treaty on European Union (TEU). According to this article, 'these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail'.⁷ It would also go against Article 22 of the Charter, which states that 'the Union shall respect cultural, religious and linguistic diversity', and against the aim of Directive 2000/78/EC, as Recital 11 states that discrimination may undermine the attainment of a high level of employment, economic and social cohesion and solidarity, while Recital 9 refers to equal opportunities and the full participation of citizens in economic, cultural and social life. Indeed, former AG Sharpston suggests that the very existence of Directive 2000/78/EC 'represents a public and praiseworthy commitment towards diversity and tolerance, including religious tolerance'.⁸

This article starts with a description of the facts and the questions referred to the CJEU in *Wabe* and *Müller*. It will then analyse whether the respective policies in these cases constitute direct religion or

⁶ L. Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace', 8 *European Labour Law Journal* (2017), p. 252; T. Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to go After Achbita and Bougnaoui?', 10 *Review of European Administrative Law* (2017), p. 67; E. Relano Pastor, 'Religious Discrimination in the Workplace: Achbita and Bougnaoui', in U. Belavusau and K. Henrard (eds.) *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing, 2019), p. 197. On these two cases and the criticism raised against them see: E. Howard, *Islamic Head Scarves and the CJEU: Achbita and Bougnaoui*, 24, 3 *Maastricht Journal of European and Comparative Law* (2017) p 348-366.

⁷ See also: E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 39.

⁸ *Ibid.*, para. 134.

belief discrimination under Article 2(2)(a) of Directive 2000/78/EC.⁹ The question whether direct or indirect discrimination is present is important, because direct discrimination can generally not be justified¹⁰ except in limited circumstances expressly laid down by law, for example, where having a specific characteristic is a genuine and determining requirement of the job.¹¹ In contrast, according to Article 2(2)(b)(i) of the Directive, indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Indirect discrimination and the objective justification test will be examined in detail, including the level of scrutiny this test requires from courts and what needs to be taken into account.¹² The role of fundamental human rights in this test is part of the analysis. The last part of this article will investigate the status of national (constitutional) norms providing stronger protection in relation to Article 8(1) of Directive 2000/78/EC and the primacy of EU law. In all this, the Opinions of AG Rantos and former AG Sharpston will play a prominent role.

2 Facts and referred questions

In the two cases now before the CJEU, both *IX* and *MJ* were Muslim women who were prohibited from wearing a headscarf at work. It must be noted, first, that both women, like the two women in the previous CJEU headscarf cases – *Achbita* and *Bougnaoui* - wore the headscarf for religious reasons; and, second, that all four cases concerned private employers, not public authorities. In fact, the earlier

⁹ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16. This Directive covers discrimination on the grounds of disability, religion or belief, age and sexual orientation.

¹⁰ There is an exception for age discrimination, as direct age discrimination can be justified under Article 6 of Directive 2000/78/EC. This is not discussed here as it is not relevant for the subject of this article.

¹¹ Article 4 Directive 2000/78/EC.

¹² It must be noted that, although the initial distinction between direct and indirect discrimination within EU law is quite clear, it is not always straightforward in practice. Recent literature suggests that courts around the world (including the CJEU) take a flexible approach that at times blurs the differences between the two concepts, see: S. Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in H. Collins and T. Khaitan (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018), p. 31-55.

judgments were criticised for not making this distinction because a duty of neutrality might be more acceptable for employees in public employment where it could affect the neutrality of the state.¹³

In *Wabe*, IX, a Muslim employee of a company running a number of nurseries, was asked to stop wearing her headscarf at work when she returned from parental leave. She had worn the headscarf at work for about 9 months before her parental leave. During her leave, her employer had introduced a neutrality policy prohibiting the wearing of any visible signs of political, ideological or religious beliefs. This policy did not apply to employees who did not come into contact with customers, but that did include IX, who was a special needs carer. After two official warnings for refusing to remove her headscarf, IX was released from work. It must be noted that, on its website, Wabe stated on the subject of 'diversity and trust':

Gender, background, culture and religion or special needs – we firmly believe that diversity enriches our lives. By being open and curious, we learn to understand one another and to respect differences. Since we welcome all children and parents, this creates an atmosphere in which everyone can feel safe, feel a sense of belonging and can develop trust. This is the basis for a healthy social development and peaceful social interaction.¹⁴

Furthermore, the 'instructions on observing the requirement of neutrality' were justified 'in order to guarantee the children's individual and free development with regard to religion, belief and politics'; and, the guidance which accompanied the policy explained that the wearing of Christian crosses, Jewish skullcaps and Muslim headscarves was not allowed.¹⁵

¹³ See: E. Howard, 27, 1 *MJECL* (2019) p. 12-13; E. Howard, 24, 3 *MJECL* (2017) p. 356; and the literature referred to there; see also: E. Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf bans? *Achbita and Bougnaoui*', 55 *Common Market Law Review* (2018) p. 613; E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 53.

¹⁴ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 18.

¹⁵ *Ibid.*, para. 21-22.

The questions referred to the CJEU concerned, first, whether, under Directive 2000/78/EC, the policy constituted direct religion or belief discrimination against employees who wear certain items of clothing for religious reasons. The second question asked whether the policy constituted indirect discrimination on the grounds of religion and/or gender against a female employee who, due to her Muslim faith, wears a headscarf. In particular, in question 2a, the referring court asked whether, under the Directive, discrimination on the grounds of religion and/or gender can be justified with the employer's subjective wish to pursue a policy of political, ideological and religious neutrality even where the employer thereby seeks to meet the subjective wishes of its customers. Because the German Constitution provides that an employer's wish to pursue a policy of religious neutrality towards its customers, which restricts an employee's right to freedom of religion, is, in principle, legitimate only if the company suffers economic harm if such neutrality did not exist, the referring court asked, in question 2b, whether these national (constitutional) rules could be seen as a more favourable provision under Article 8(1) of Directive 2000/78/EC or whether the Directive and Article 16 of the Charter prevent this. *The referring court, (German Federal Constitutional Court) expressed its opinion that this requirement in the German Constitution fits with what the CJEU held in Bougnaoui.*¹⁶

Müller concerned MJ, a Muslim employee of a company which ran a number of chemist shops. MJ had worked for the company since 2002, without wearing a headscarf. She decided, after she had been on parental leave in 2014, to start wearing a headscarf, based on her religious beliefs. Her employer asked her to take the headscarf off as it was against the company rules *but she refused. She then carried on a different activity for which she did not have to remove her headscarf, so the employer did accommodate her for a period. However, in June 2016, she was instructed to come to work without any prominent and large-scale signs of religious, philosophical and political convictions.*¹⁷ This rule

¹⁶ Ibid., para. 28.

¹⁷ Ibid., para. 32.

applied to all shops and aimed to preserve neutrality and avoid conflicts between employees as there had been such conflicts in the past. The rule in this case differed from the policy in *Wabe* in that it did not prohibit all signs, but only prominent and large-scale signs.¹⁸

The questions referred were, first, whether indirect discrimination on grounds of religion could be justifiable only if an employer's policy prohibited all visible signs of religious, political and philosophical belief rather than such signs which are prominent and large scale. If the answer to this question was negative, the second question was whether the right to freedom of religion as guaranteed in Article 10 of the Charter and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) should be taken into account in determining justification. The last question was partly similar to question 2b in *Wabe*: whether national constitutional provisions fell under Article 8(1) of Directive 2000/78/EC and, if not, whether these must be set aside because of primary EU law even if primary EU law, such as, for example, Article 16 of the Charter, recognises national laws and practices.

3 Direct or indirect discrimination

According to Article 2(2)(a) of Directive 2000/78/EC, direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on one of the grounds covered by the Directive. Article 2(2)(b) defines indirect discrimination as occurring where an apparently neutral provision, criterion or practice would put persons with a particular characteristic covered by the Directive at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The questions referred to the CJEU in these two cases already indicate that the judgments in the earlier cases, *Achbita* and *Bougnaoui*, left a number of issues unclear, including whether there was direct or

¹⁸ Ibid., para. 34.

indirect discrimination, on which the referring courts did not agree. The referring court in *Wabe* was of the opinion that there was direct discrimination, because the unfavourable treatment suffered by IX, as a result of being issued with a warning for having worn an Islamic headscarf at work, relates to a specific characteristic (religion) protected by Article 1 of Directive 2000/78/EC. The referring court in *Müller*, however, held that there was indirect discrimination.

In relation to *Wabe*, AG Rantos referred to the fact that the CJEU, in *Achbita*, concluded that there is no direct discrimination where the wearing of any visible sign of political, philosophical or religious beliefs at work is prohibited, because such a rule treated all workers the same.¹⁹ He concluded that there would be direct discrimination 'if a worker was treated less favourably according to whether he belongs to one religion or another'.²⁰ In this case, the employer's neutrality policy treated everyone the same: female employees who wanted to wear an Islamic headscarf were treated the same as employees who were of a different faith, or were non-religious or atheists. Therefore, these instructions did not appear to establish less favourable treatment of a worker that is directly and specifically linked to their religion or beliefs.²¹ The AG concluded that direct discrimination could not occur where all religions or beliefs were covered in the same way by the employer's policy.²² However, AG Rantos appears not to apply this in *Müller*. He discusses the rule there which only prohibits prominent and large scale signs and rejects the argument made by MJ and the Greek and Swedish Governments, in written observations, that such an internal rule will have an unfavourable effect on certain groups who wear particularly visible religious symbols and, therefore, employees belonging to those groups are at a greater risk of suffering discrimination in the workplace on account of their religion or beliefs.²³ It is submitted that this argument is valid: the rule in *Müller* does not cover all

¹⁹ Ibid., para. 47-48.

²⁰ Ibid., para. 50.

²¹ Ibid., para. 52.

²² Ibid., para. 55.

²³ Ibid., para. 78.

religions or beliefs in the same way, it distinguishes between religions and, thus, this arguably constitutes direct discrimination, following AG Rantos conclusion in relation to *Wabe*.

Former AG Sharpston opines that the rule in both cases very likely constitutes direct discrimination. The rule in *Wabe* discriminates between religious groups who consider themselves mandated by their religion to wear certain clothing in comparison with members of religions who do not mandate specific apparel and with employees who do not have a religion. A partial ban, like the rule in *Müller*, discriminates between religions.²⁴ In support, former AG Sharpston refers to: *Cresco Investigations*,²⁵ where a difference in treatment between members of certain churches and members of other churches was held to be direct discrimination; *CHEZ*,²⁶ where the CJEU held that a measure which gives rise to a difference in treatment introduced for reasons relating to a prohibited ground of discrimination was direct discrimination; and, *Feryn*, where a statement by an employer that he would not employ ‘immigrants’ because his customers did not want to give them access to their houses, was held to be direct discrimination. The CJEU considered that such a statement was likely to dissuade some candidates from applying.²⁷ It is argued that a neutrality policy like the employer’s policies in *Achbita*, *Bougnaoui*, *Wabe* and *Müller* would likely dissuade people who wear certain symbols for religious reasons from applying.

In relation to *CHEZ*, two further points must be noted. First, the referring court, in *Wabe*, used *CHEZ* to support its finding that there was direct discrimination. Second, the CJEU pointed out that the fact that a practice was based on stereotypes and prejudice should be taken into account when deciding

²⁴ E. Sharpston, ‘Shadow Opinion: Headscarves at Work’, *EU Law Analysis* (2021), para. 122-123.

²⁵ Case C-193/17 *Cresco Investigation GmbH v. Markus Achatzi*, EU:C:2019:43, para. 40.

²⁶ Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, EU:C:2015:480, para. 109.

²⁷ Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, EU:C:2008:397, para. 23-25. E. Sharpston, ‘Shadow Opinion: Headscarves at Work’, *EU Law Analysis* (2021), para. 183-184.

whether the practice constituted direct discrimination.²⁸ Former AG Sharpston comments, when referring to *CHEZ*, that:

Thus, were the national court in either case before it to conclude, as sole judge of facts, that the imposition of the apparently neutral rule was in reality motivated by a desire to avoid fellow employees or clients being affronted by the presence of a hijab-wearing observant Muslim female employee, that finding of fact would – I suggest – provide a strong basis for concluding that there was direct, rather than indirect, discrimination.²⁹

Others have also suggested that such a policy or practice, based on prejudice and stereotypes, amounts to direct discrimination, including AG Kokott in her opinion in *Achbita*.³⁰ Cloots, for example, remarks, referring to *Chez*, that it is remarkable that the CJEU did not make any mention of stereotypes and prejudices against Muslims in *Achbita* and *Bougnaoui*.³¹

Therefore, the AG and the former AG came to different conclusions regarding whether the bans at issue in these two cases constituted direct or indirect discrimination and this reflects wider opinions on this question in relation to *Achbita* and *Bougnaoui*. From the fact that the EU legislature, in enacting Directive 2000/78/EC, intended to create a coherent, functioning and effective system to combat

²⁸ Case C-83/14 *CHEZ*, para. 82.

²⁹ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), footnote 208.

³⁰ Opinion of Advocate General Kokott in Case C-157/15 *Achbita*, EU:C:2016:382, para. 55; E. Bribosia and I. Rorive, 'ECJ Headscarf Series (4): The Dark Side of Neutrality', *Strasbourg Observers* (2016) <https://strasbourgobservers.com/2016/09/14/ecj-headscarf-series-4-the-dark-side-of-neutrality/>; E. Brems, 'ECJ Headscarf Series (5): The Field in Which Achbita Will Land - A Brief Sketch of Headscarf Persecution in Belgium', *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/16/ecj-headscarf-series-5-the-field-in-which-achbita-will-land-a-brief-sketch-of-headscarf-persecution-in-belgium/>; S. Ouald Chaib, 'ECJ Headscarf Series (6): The Vicious Circle of Prejudice against Muslim Women', *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/20/ecj-headscarf-series-6-the-vicious-circle-of-prejudices-against-muslim-women/>; E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', *Blog of the IACL, AIDC* (2017), <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>; E. Howard, 24, 3 *MJECL* (2017) 351-354; E. Relano Pastor, in U. Belavusau and K. Henrard (eds.) *EU Anti-Discrimination Law Beyond Gender*, p. 197; J. Weiler, 'Je Suis Achbita!', 15, 4 *International Journal of Constitutional Law* (2017) 894-896; E. Cloots, 55 *CMLR* (2018) p. 611.

³¹ E. Cloots, 55 *CMLR* (2018), p. 611.

discrimination in employment – whether direct or indirect - , former AG Sharpston deduces that the concepts of direct and indirect discrimination should not be construed in ‘a way that permits a kind of “black hole” to emerge between direct discrimination and indirect discrimination into which a number of questionable practices fall’.³² Therefore, she examines whether the definition of direct discrimination should be enlarged, and suggests:

Thus, a possible approach might be to say that, where an employer imposes a criterion that he either knows or ought reasonably to have known will inevitably place a member of a particular group in a less favourable position on the basis of any of the grounds referred to in Article 1 of Directive 2000/78, that should be assimilated to treating that person less favourably than another in a comparable situation on the basis of a prohibited ground for the purposes of Article 2(2)(a) of that directive (direct discrimination).³³

The former AG suggests that *CHEZ* provides support for such an approach. She also advocates a very rigorous scrutiny of justification of indirect discrimination and a high standard of proof for any employer who relies on such justification.³⁴ This will be examined below, after an assessment of the grounds of discrimination.

It must be noted that the issue of whether there is direct or indirect discrimination is also the subject of another pending case at the CJEU: *LF v. SCRL*, where the questions referred mention direct discrimination and a number of different comparators for such discrimination.³⁵

4 Indirect discrimination on the grounds of religion and/or gender

³² E. Sharpston, ‘Shadow Opinion: Headscarves at Work’, *EU Law Analysis* (2021), para. 43 and 202.

³³ *Ibid.*, para. 263.

³⁴ *Ibid.*, para. 205.

³⁵ Case C-344/20 *LF v. SCRL*, preliminary reference.

In *Wabe*, the referring court asked whether the employer's neutrality policy constituted indirect discrimination on the grounds of religion and/or gender. IX had argued that this policy constituted both gender and ethnic origin discrimination, because it aimed at headscarves and thus only concerns women, and it concerned a larger proportion of women with a migrant background. The referring court did not mention 'ethnic origin' as a discrimination ground.³⁶ Bans on the wearing of religious clothing generally affect women more than men³⁷ and thus could be indirect discrimination on the ground of gender, unless objectively justified. Former AG Sharpston acknowledges this where she mentions the possibility of the neutrality policy constituting 'triple discrimination' against a headscarf wearing woman, because she is Muslim (religion), because she is a woman (the requirement to dress modestly in the Quran is addressed to women), and because she comes from a different ethnic community (racial or ethnic origin).³⁸ The referring court and former AG Sharpston thus recognise that bans on the wearing of religious clothing can constitute multiple or intersectional discrimination, discrimination based on the coincidence or aggregation of different protected grounds, and that this can make certain groups particularly vulnerable. Directive 2000/78/EC acknowledges, in Recital 3, that 'women are often the victims of multiple discrimination'. Support for the argument that neutrality policies regarding the wearing of religious clothing at work constitute gender discrimination or discrimination on a combination of gender, ethnic and/or religious grounds can also be found in the literature.³⁹

The former AG concludes that it is for the national court to determine whether there is double or triple (multiple) discrimination, but that, in her view, an advanced and very rigorous level of scrutiny of the justification brought forward by the employer should be applied to 'provide adequate safeguards for

³⁶ E. Howard, 27, 1 *MJECL* (2019) p. 17..

³⁷ A. Blair, 'Case Commentary: R (SB) v Headteacher and Governors of Denbigh High School – Human Rights and Religious Dress in Schools', 17 *Child and Family Law Quarterly* (2005), p. 411; A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace', 38 (2009), p. 18; T. Loenen, 10 *Review of European Administrative Law* (2017), p. 67.

³⁸ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 267, further elaborated on in para. 268-269. See also footnote 239.

³⁹ See on this: E. Howard, 27, 1 *MJECL* (2019) p. 18, and the literature referred to in footnote 45.

these very vulnerable categories of potential employees'.⁴⁰ She also points out that the referring court has not in fact cited any EU law provision on gender discrimination and that the material before the CJEU is inadequate to enable it to apply any rigorous analysis to those issues.⁴¹ AG Rantos mentions these last two issues without stating anything in relation to multiple discrimination.⁴² The first issue might not be such a problem, as the CJEU pointed out, in *Achbita*, that it is settled case law that the Court may provide guidance on the interpretation of provisions of EU law whether or not the referring court mentioned these in its questions.⁴³ It would, however, still be prudent for Muslim women who wear headscarves for religious reasons to challenge their employers' neutrality policies in national courts as discrimination on the grounds of gender, religion and/or racial or ethnic discrimination; and, for national courts to examine the facts regarding all these grounds of discrimination and to mention all EU legislation against these forms of discrimination when referring questions to the CJEU. This would force the CJEU (and its Advocates General) to address the issue of gender discrimination in more detail.

In relation to multiple discrimination, it must be noted that the CJEU has held, in *Parris*, which concerned a claim for sexual orientation and age discrimination or a combination of these two grounds under Directive 2000/78/EC, that a claim on combined grounds can only be successful if there is discrimination on either one of the single grounds.⁴⁴ This suggests that a claim for multiple discrimination could not succeed unless discrimination on one of the grounds is established.

It was mentioned that a neutrality policy like the work policies in *Achbita*, *Bougnaoui*, *Wabe* and *Müller*, would dissuade people who wear certain symbols for religious reasons from applying for employment with this employer. This links with the reference to 'these very vulnerable categories of

⁴⁰ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 270.

⁴¹ *Ibid.*, para. 296.

⁴² Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 59.

⁴³ Case C-157/15 *Achbita*, para. 33.

⁴⁴ *Case C-443/15 Parris v. Trinity College Dublin*, EU:C:2016:897, para. 80-81. The CJEU went against AG Kokott, who had argued for a more open approach, see: Opinion Advocate General Kokott in *Case C-443/15 Parris*, EU:C:2016:493, para. 147-159.

employees' by former AG Sharpston, as the neutrality policies would have a serious effect on the employment opportunities and the social inclusion of people belonging to religious minorities and especially of Muslim women, **groups that are already vulnerable to discrimination because of stereotypes and prejudice.**⁴⁵ It is submitted that this is contrary to the founding values of the EU as laid down in Article 2 TEU and the respect for religious diversity in Article 22 of the Charter. It would also be contrary to the goals of the Directive 2000/78/EC. As Relano-Pastor writes:

The recitals to the directives make clear that EU action to counter discrimination is no longer driven by market integration alone, but also by the goal of attaining economic and social cohesion, solidarity, and the development of the EU as an area of freedom, security and justice. In order to achieve social cohesion, one factor to take into consideration is the protection of vulnerable groups. Any action that could undermine the effective integration of specific groups, such as Muslim women, into the labour market should be carefully scrutinised.⁴⁶

Therefore, measures and policies, such as the neutrality policies in these four cases, which affect the position in the labour market and wider society of vulnerable groups, should be subjected to a strict justification test. This is analysed next.

5 Justification of indirect discrimination

As mentioned, indirect discrimination is not against the law if it is objectively justified, if the difference in treatment has a legitimate aim and the means to achieve that aim are proportionate and necessary. According to Article 10 of Directive 2000/78/EC, the burden of proving this objective justification lies with the employer. The CJEU has held that the concept of objective justification must be interpreted

⁴⁵ T. Loenen, 10 *Review of European Administrative Law* (2017), p. 67; E. Relano Pastor, in U. Belavusau and K. Henrard (eds.) *EU Anti-Discrimination Law Beyond Gender*, p. 197; L. Vickers, 8, 2 *European Labour Law Journal* (2017), p. 252.

⁴⁶ E. Relano Pastor, in U. Belavusau and K. Henrard (eds.) *EU Anti-Discrimination Law Beyond Gender*, p. 196. See also on discrimination being a threat to social cohesion: E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 40.

strictly.⁴⁷ This fits in with the case law of the CJEU that exceptions to the principle of equal treatment must be interpreted strictly or narrowly.⁴⁸ This strongly suggests that any justification brought forward for indirect discrimination must be rigorously scrutinised. However, the CJEU, in *Achbita* and *Bougnaoui*, was criticised for not doing so.⁴⁹ As mentioned, former AG Sharpston advocates a very rigorous scrutiny of any justification of indirect discrimination and a high standard of proof for any employer who relies on such justification.⁵⁰ This close and rigorous scrutiny must be applied to all three aspects of the justifications test in order to avoid ‘suspect practices to get through’.⁵¹

5.1 Legitimate aim

The CJEU, in *Achbita*, has been criticised for accepting, without further explanation, that an employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business which is recognised in Article 16 of the Charter, and that this is, in principle, a legitimate aim.⁵² AG Rantos refers to this, but seems to go further than the CJEU, in that he added that a neutrality policy adopted ‘in order to take account of the wishes of customers’ fell under this.⁵³ The AG also seems to contradict himself somewhat: on the one hand, he considers that, where there is no neutrality policy, the wishes of customers to no longer have the services provided by a female employee wearing a headscarf are not a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC, as the CJEU held in *Bougnaoui*. He concludes that those wishes cannot justify the existence of a difference in treatment within the meaning of Article 2(2)(b) of the Directive – in other

⁴⁷ Case C-83/14 *CHEZ*, para. 122.

⁴⁸ See, for example: Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para. 36; Case C-273/97 *Sirdar v. the Army Board and Secretary of State for Defence*, EU:C:1999:523, para. 23; Case C-285/98 *Kreil v. Bundesrepublik Germany*, EU:C:2000:02, para. 20, (all three concerned sex discrimination); Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, EU:C:2010:4, para. 60; Case C-447/09 *Prigge and Others v. Deutsche Lufthansa AG*, EU:C:2011:573, para. 56 and 72 (both concerned age discrimination).

⁴⁹ For a discussion of this see: E. Howard, 24, 3 *MJEC* (2017), p. 355-360; J. Weiler, 15, 4 *International Journal of Constitutional Law*, p. 885-892.

⁵⁰ E. Sharpston, ‘Shadow Opinion: Headscarves at Work’, *EU Law Analysis* (2021), para. 205.

⁵¹ *Ibid.*, para. 218.

⁵² See: E. Howard, 24, 3 *MJEC* (2017), p. 355-356.

⁵³ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 60, 66 and 68.

words, cannot justify indirect discrimination.⁵⁴ On the other hand, the AG writes that there may be other reasons why an employer pursues a neutrality policy: for example the wishes of customers to adopt such an approach. He refers to the fact that Wabe runs nurseries and that parents may not want their children's teachers to manifest their religion or beliefs in the workplace. He takes into account that Article 14(3) of the Charter guarantees respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.⁵⁵ The AG also appears to ignore the statement from Wabe on its website with regards to 'dignity and trust,' cited above, which might play a role in why parents choose to send their children to one of their nurseries. The tension between the judgments in *Achbita* and *Bougnaoui* in relation to the wishes of customers was pointed out by a number of writers,⁵⁶ but the way AG Rantos links both more clearly to the wish of customers makes his own contradiction more visible.

When examining the question, in *Müller*, whether a policy that only ban prominent – the AG mentions 'conspicuous' here, rather than 'prominent' - and large scale signs of religious, philosophical or political beliefs could justify indirect discrimination, AG Rantos considered that that question, in effect, amounts to determining whether the *visible* wearing, in the workplace, of *small-scale* signs of political, philosophical or religious beliefs is appropriate.⁵⁷ But is this really what the referring court asks? The referring court asks whether the judgment in *Achbita* that a policy which prohibits all signs of religious, political and philosophical beliefs is a legitimate aim, also applies to policies which do not prohibit all signs but only prominent and large scale signs, or whether the latter is discriminatory. AG Rantos expresses the answer to his own question as follows:

... a policy of political, philosophical or religious neutrality pursued by an employer,
in its relations with its customers, is not incompatible with the wearing, by its

⁵⁴ Ibid., para. 64. AG Rantos refers to the judgment in *Bougnaoui*.

⁵⁵ Ibid., para. 65.

⁵⁶ See on this: E. Howard, 24, 3 MJECL (2017), p. 364 and the literature referred to there.

⁵⁷ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 71 and footnote 27.

employees, of signs, whether visible or not, that are small in scale (in other words: discreet) of political, philosophical or religious beliefs in the workplace which are not noticeable at first glance. It is true that even small-scale signs, such as a pin or an earring, may reveal to an attentive and interested observer the political, philosophical or religious beliefs of a worker. However, such discreet signs, which are not conspicuous, cannot, in my view, upset those customers of the undertaking who are not of the same religion or do not share the same beliefs as the employee(s) concerned.⁵⁸

Is AG Rantos here not determining what will and what will not upset customers? On what basis does he submit that, even if customers can see and understand the meaning of small-scale signs, this cannot upset them? Customers might be more upset by a small visible sign which shows adherence to a particular, e.g. a far-right, political party or a rainbow ribbon, than by a Islamic headscarf or a Jewish skull cap. The AG adds, in a footnote, that he is 'working on the assumption that a small-scale sign, which is not worn to be highlighted, is not conspicuous'.⁵⁹ However, it can be argued that small scale signs, whether conspicuous or not, are worn 'to be highlighted', to draw attention to a political or philosophical belief, while a religious sign is general not worn to do so but because the wearer sees this as mandated by their religion. AG Rantos then concludes that the employer is at liberty, within the context of the freedom to conduct a business, to prohibit only the wearing of conspicuous, large-scale signs of such beliefs; that it is up to the national court to determine what sign are 'small-scale' on a case-by case basis; however, that he is of the view that an Islamic headscarf is not a small scale religious symbol.⁶⁰ The above indicates that the rule in this case lacks transparency and could lead to significant differences in outcome for different (religious) groups.

⁵⁸ Ibid., para. 74.

⁵⁹ Ibid., footnote 27.

⁶⁰ Ibid., para. 75-77.

As mentioned, some of the written observations saw this rule also as amounting to discrimination between people from different religions. AG Rantos refers to this and acknowledges that religious symbols may be more or less visible according to the religion and then states:

However, following that argument would necessarily amount to prohibiting the wearing of any sign of political, philosophical or religious beliefs, with a view to applying a policy of neutrality, which would appear paradoxical in the light of the objective of Directive 2000/78, which seeks to combat discrimination on the grounds of religion or belief. As the Court has observed, the prohibition of such signs must be limited to what is strictly necessary [reference to *Achbita*]. Otherwise the total prohibition – without exception – on the visible wearing of any sign of political, philosophical or religious beliefs would go beyond what is necessary and would, in respect of those who have chosen to wear a small-scale sign, be punitive, solely because other persons have chosen to wear conspicuous signs.⁶¹

In using the word ‘punitive’, is the AG saying that it is not okay to ‘punish’ (or disadvantage) people who wear small-scale signs, but it is okay to ‘punish’ (or disadvantage) those who wear large-scale signs? He also seems to suggest that a general policy prohibiting all signs of political, philosophical or religious beliefs is more than what is necessary. If that is true, a general policy would not be justified and this would go against what the CJEU held in *Achbita*. This is then contradicted by the conclusion of AG Rantos that a policy of neutrality can take several forms, provided that it is pursued in a consistent and systematic manner, as the CJEU held in *Achbita*. This appears to give an employer carte blanche in relation to how they formulate neutrality policies to follow the wishes, in other words, to pander to the prejudices, of their customers. But what about customers who do not want to be served by a black person, a disabled person or a woman? Would the employer be able to pander to these

⁶¹ Ibid., para. 79.

prejudices as well? As Cloots writes, 'it would defeat the very purpose of discrimination law if individual employers were permitted to invoke customer pressure to legitimize an interference with their anti-discrimination duties'.⁶²

In contrast to this very easy acceptance of a neutrality policy as a legitimate aim which can justify indirect discrimination, former AG Sharpston suggests to submit the employer to a much more rigorous test and proposes that the national court should ask the following questions:

- (i) What precisely is the aim pursued by the employer (if the aim is neutrality per se, why is that legitimate)?
- (ii) Is that aim consistent with other statements this employer has made as to his primary aims and objectives (if neutrality is being pursued to further some (other) primary aim, how or why does that make neutrality itself a legitimate aim)?
- (iii) Does pursuit of that aim potentially create a disparate adverse impact upon an identifiable group of employees leading to potential indirect discrimination on one of the prohibited grounds?
- (iv) If so, does this employer have a specific and legitimate reason for its stated aim?
- (v) Is the stated aim a legitimate aim for this employer to hold in respect of its business as a whole?
- (vi) If not, is the stated aim a legitimate aim for this employer to hold in relation to the particular post(s) to which this complaint relates?

⁶² E. Cloots, 55 *CMLR* (2018) p.613-614.

It is submitted that applying this very rigorous test to the legitimate aim brought forward by an employer for a policy or measure that has an adverse impact on certain people is the right approach, and is necessary to avoid harming the employment opportunities and wider inclusion of people belonging to vulnerable groups.

5.2 *Appropriate means*

Once the legitimate aim has been identified, it needs to be established if the measures taken are appropriate and necessary to achieve that aim. In *Leone*, the CJEU held that this means that the measures ‘genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof’.⁶³ In *Achbita*, the CJEU followed this and held that the ban on visible political, philosophical or religious signs, imposed by G4 S, was appropriate to achieve the aim of the policy of neutrality as long as that policy was ‘genuinely pursued in a consistent and systematic manner’.⁶⁴ AG Rantos was rather short in his assessment of the question whether the means used were appropriate and necessary. He stated, referring to *Achbita*, that Wabe’s neutrality policy only covered those employees who interacted with customers and thus that it, subject to the checks to be done by the referring court, was not only appropriate but also strictly necessary to achieve the aim pursued.⁶⁵ Former AG Sharpston stresses the importance of maintaining a proper level of scrutiny and suggests that the employer has to show: the precise basis on which they submit that a policy is appropriate; whether they considered other means which would have a less disparate impact and if not, why not; and, if other means were considered, why were they rejected.⁶⁶ So, here again, the difference lies the level of scrutiny applied: AG Rantos and the CJEU, in *Achbita* and *Bouagnaoui*, applied

⁶³ Case C-173/13 *Maurice Leone and Blandine Leone v. Garde des Sceaux, Ministre de la Justice and Caisse Nationale de Retraite des Agents des Collectivités Locales*, EU:C:2014:2090, para. 79.

⁶⁴ Case C-157/15 *Achbita*, para. 40.

⁶⁵ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 62. See also para. 77.

⁶⁶ E. Sharpston, ‘Shadow Opinion: Headscarves at Work’, *EU Law Analysis* (2021), para. 226 and 237.

a rather lenient test, while Sharpston applies a much more rigorous test. This will be further analysed below.

5.3 Necessary means

The means used to achieve the legitimate aim must also be necessary and a measure is not necessary if there are alternative ways of achieving the legitimate aim which are less discriminatory or less of an infringement on the principle of equal treatment.⁶⁷ As the CJEU stated in *Léger*, 'when there is a choice between several appropriate measures, recourse must be had to the least onerous among them'.⁶⁸ Both AG Rantos and former AG Sharpston refer to the principle of proportionality in this context, with the latter adding that proportionality is essentially about balancing competing rights.⁶⁹ But which rights are competing here and which rights must be balanced? The referring court in *Müller*, asked whether the right to freedom of religion as guaranteed in Article 10 of the Charter and Article 9 of the ECHR should be taken into account in determining justification. AG Rantos draws a distinction between the first part of the justification test (legitimate aim) and the two further parts (appropriate and necessary means).⁷⁰ He continues that the CJEU, in *Achbita*, only made reference to Article 16 of the Charter and Article 9 ECHR in the context of examining the legitimate aim. He then deduces that neither the freedom to conduct a business nor the freedom of religion are involved any longer in the assessment of the appropriateness and necessity of the measures; and, that he believes that the freedom of religion in Article 10 of the Charter should not be taken into account when examining whether the means are appropriate and necessary.⁷¹ According to the AG, this is because the Directive

⁶⁷ See: D. Schiek, 'Indirect Discrimination', in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), p. 357; S. Haverkort-Speekenbrink, *European Non-Discrimination Law - A Comparison of EU law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012), p. 76; L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Bloomsbury, 2016), p. 66.

⁶⁸ Case C-528/13 *Geoffrey Léger v Ministre des Affaires Sociales, de la Santé et des Droits des Femmes, Établissement Français du Sang*, EU:C:2015:288, para. 58.

⁶⁹ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 79; E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 239.

⁷⁰ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 79.

⁷¹ *Ibid.*, para. 94-95 and 100.

specifically aims to combat discrimination on the grounds, *inter alia*, of religion or belief and not to protect the right to freedom of religion.⁷²

It is submitted that this is the most baffling part of the AG's opinion and it is argued here that the fundamental rights of both parties do need to be taken into account in the proportionality test, which is precisely about balancing these different rights. Support for this argument can be found, first, in the Preamble of Directive 2000/78/EC, which, in its very first Recital, refers to human rights and fundamental freedoms as laid down in the ECHR. Recital 5 then states that it is important to respect such fundamental rights and freedoms. Second, in *Achbita* and *Bougnaoui*, the CJEU refers to Recital 1 and mentions the common traditions of the Member States which have been reaffirmed in the Charter and which include the right to freely manifest one's religion in Article 10.⁷³

Third, support can also be found in the Opinions of both AG Kokott, in *Achbita*, and AG Sharpston, in *Bougnaoui*, which mention that the justification test includes a balancing of interests: a fair balance must be struck between the conflicting interests of employees and employers. AG Kokott mentions Article 10 of the Charter and states that it is important to take due account of this, from the point of view of the principle of equal treatment, when seeking to strike a fair balance between the interests of employers and employees.⁷⁴ AG Sharpston writes that the proportionality test means that an effort must be made to reconcile adequately the competing rights of the employee to manifest their religion and of the employer to conduct their business. She continues that, if this is not possible, 'the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions'.⁷⁵

Fourth, in *Egenberger*, the CJEU took account of Article 10 of the Charter in assessing whether a genuine and determining occupational requirement was justified under Article 4(2) of Directive

⁷² Ibid., para. 97.

⁷³ Case C-157/15 *Achbita*, para. 26-27; Case C-188/15 *Bougnaoui*, para. 28-29.

⁷⁴ Opinion AG Kokott in C-157/15 *Achbita*, para. 113.

⁷⁵ Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui*, para. 133.

2000/78/EC.⁷⁶ Fifth, in his opinion, AG Rantos takes account of the case law of the European Court of Human Rights (ECtHR) on Article 9 ECHR in concluding that discreet, small-scale signs are not inappropriate.⁷⁷ But this ignores that, in *Eweida*, the right of the employer to project a certain corporate image was weighed against the employee's desire to manifest her religious belief and a violation of *Eweida's* freedom of religion was found because a fair balance had not been struck between these two rights.⁷⁸ In other words, the ECtHR held that the rights of the employee to manifest her religion should weigh heavier than the right of the employer.

Sixth, academic literature also supports the argument that fundamental rights need to be taken into account in the justification test for indirect discrimination.⁷⁹ Weiler states very clearly that the freedom to conduct a business in Article 16 of the Charter must be balanced against 'the freedoms, guaranteed under Directive 2000/78, the Charter and the ECHR' of the employee.⁸⁰ Bell writes that what is missing from the judgment in *Acbita*, is any balancing of the needs of the corporate policy with the disadvantages imposed on the individuals affected, as the European Court of Human Rights did in *Eweida*.⁸¹ Moreover, Loenen points out the commitment of the EU to improve the protection of fundamental rights across the Union; and, that one would expect the CJEU to strive as a matter of general principle for a high level of protection of rights and freedoms of workers, including their religious freedom, especially because the workers most affected by prohibitions on wearing religious clothing, belong to groups that are most in need of economic and social integration.⁸² Therefore,

⁷⁶ Case C-414/16 *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, EU:C:2018:257, para. 50.

⁷⁷ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 72-73. AG Rantos refers to ECtHR, *Eweida and Others v. the United Kingdom*, Judgment of 15 January 2013, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

⁷⁸ ECtHR, *Eweida and Others v. the United Kingdom*, para. 94.

⁷⁹ M. Bell, 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace', 17 *Human Rights Law Review* (2017), p. 794; E. Brems, 'European Court of Justice Allows Bans on Religious Dress in the Workplace', *IACL-AIDC Blog* (2017); T. Loenen, 10 *Review of European Administrative Law* (2017), p. 71; J. Weiler, 15, 4 *International Journal of Constitutional Law*, p. 882, and 886-887; A. Sledzinska-Simon, 'Unveiling the Culture of Justification in the European Union, Religious Clothing and the Proportionality Review', in U. Belavusau and K. Henrard (eds.) *EU Anti-Discrimination Law Beyond Gender*, (Hart Publishing, 2019) p. 210.

⁸⁰ J. Weiler, 15, 4 *International Journal of Constitutional Law*, p. 882.

⁸¹ M. Bell, 17 *HRLR* (2017), p. 794.

⁸² T. Loenen, 10 *Review of European Administrative Law* (2017), p. 71.

Loenen stresses the particular importance of protecting the fundamental rights of people belonging to vulnerable groups.

Lastly, former AG Sharpston expresses that the proportionality test means a balancing of rights and that 'the rights conferred by the Directive are complemented, at a higher level, by specific Charter rights' such as Article 10 of the Charter. These rights have to be weighed against the employer's freedom to conduct a business in accordance with Union law and national laws and practices, as laid down in Article 16 of the Charter. The latter right, the former AG points out, 'is not an unfettered right to run a business in the way that the employer deems will be most profitable to him, still less a right whose wording shows that it is intended to take automatic precedence over other, competing rights'.⁸³

All these arguments lead to the conclusion that fundamental human rights do need to be taken into account in all three parts of the justification test for indirect discrimination. The right of the employer under Article 16 must be weighed against the rights of the employee under Articles 10 and 21 of the Charter. It is suggested here, that Article 31 of the Charter, which guarantees the right of every worker to working conditions which respect his or her dignity, should also be taken into account,⁸⁴ considering that human dignity is one of the founding values of the EU in Article 2 TEU and is 'inviolable' according to Article 1 of the Charter. And, as Former AG Sharpston mentions 'Directive 2000/78 seeks to ensure that everyone can access the employment market under conditions that respect their identity and their dignity'.⁸⁵

The above also leads to the conclusion that a strict justification test needs to be applied in cases where employers want to have a neutrality policy which prohibits employees from wearing political,

⁸³ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 239.

⁸⁴ M. Steijns, 'Achbita and Bougnaoui: Raising more Questions than Answers', *Eutopia Law* (2017), <https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>.

⁸⁵ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 40. Relano-Pastor also points out the link between equality and dignity, see: E. Relano Pastor, in U. Belavusau and K. Henrard (eds.) *EU Anti-Discrimination Law Beyond Gender*, p. 201.

philosophical or religious symbols at work. All three parts of this test need to be scrutinised rigorously. The fact that the CJEU has held that this test must be interpreted strictly and narrowly indicates that equal treatment is the rule, and exceptions to this rule must be scrutinised closely. This is also clear from the interpretation of the appropriateness and necessity tests, which must include considering whether the same legitimate aim can be achieved by means less discriminatory and less restrictive of the rights of the employee. As mentioned above, the CJEU was criticised for not applying a strict justification test in *Achbita* and *Bougnaoui*, and the same criticism has been aimed at AG Rantos.⁸⁶

6 Status of national norms and Article 8(1) Directive 2000/78/EC

As stated, the German Constitution provides that an employer's wish to pursue a policy of religious neutrality which restricts an employee's right to freedom of religion, is legitimate only if the company would suffer economic harm if such neutrality did not exist. In relation to the question regarding the status of such a national constitutional rule, which give stronger protection to fundamental rights, and whether this could be considered as a more favourable provision under Article 8(1) of Directive 2000/78/EC or whether these should be set aside because of primary EU law, such as Article 16 of the Charter, both AG Rantos and former AG Sharpston came to the same conclusion: neither the Directive, nor Article 16 of the Charter preclude a national court from applying such national constitutional rules.⁸⁷ AG Rantos adds that this applies as long as those provisions do not undermine the principle of non-discrimination laid down in that Directive, which is for the referring court to ascertain'.⁸⁸ Former AG Sharpston argues that the test laid down in *Åkerberg Fransson* must be respected, which is that 'the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity

⁸⁶ M. van den Brink, 'Preserving Prejudice in the Name of Profit: AG Rantos Opinion in *IX v Wabe* and *MH Müller Handels GmbH*', *Verfassungsblog* (2021), <https://verfassungsblog.de/preserving-prejudice-in-the-name-of-profit/>.

⁸⁷ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para.112; E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 109.

⁸⁸ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para.112.

and effectiveness of European Union law are not thereby compromised'.⁸⁹ Both the AG and the former AG thus conclude that the judgment of the CJEU in *Melloni*,⁹⁰ does not apply to Directive 2000/78/EC,⁹¹ a question that had led to some discussion after the judgments in *Achbita* and *Bougnaoui*.⁹² Therefore, if the CJEU follows its AG in these cases, this question will be solved.

The German constitutional provision means that the employer will have to provide evidence of economic harm for restricting an employee's right to manifest their religion, and that, in the absence of this, a neutrality policy is considered not to be justified. It is suggested that real (economic) harm should also be required under the justification test for indirect discrimination because, in the balancing of conflicting rights and competing interests, a merely possible or even presumed (economic) harm to the employer's interests should not weigh heavier than a genuine restriction on the fundamental rights of the employee not to be discriminated against on the ground of their religion and their right to freely manifest their religion. In other words, if the employer cannot provide evidence of real harm, the discriminatory policy should be held not to be justified. Support for this can be found in *Eweida*, where the ECtHR accepted the employer's wish to promote a neutral image as a legitimate aim, but then concluded that: 'there was no evidence that the wearing of other, previously authorised, items of religious clothing by other employees had any negative impact on the employer's brand or image'; and, because there was 'no evidence of any real encroachment on the interests of others', the ECtHR found a violation of Eweida's Article 9 right.⁹³ More support can also be found in *Egenberger*, where the CJEU described that the genuine and determining occupational requirement in Article 4(2) of Directive 2000/78/EC must be justified and that this means that the religious organisation must show that the supposed risk of causing harm to its ethos is probable and substantial,

⁸⁹ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 109. She refers to Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105..

⁹⁰ Case C-399/11 *Melloni v. Ministerio Fiscal*, EU:C:2013:107.

⁹¹ For the reasoning behind this conclusion see: Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 101-112 and footnote 45; E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 81-109.

⁹² See for this discussion: E. Howard, 27, 1 *MJECL* (2019) p. 23-26.

⁹³ ECtHR, *Eweida and Others v. the United Kingdom*, para. 94-95.

so that imposing such a genuine and determining occupational requirement is necessary.⁹⁴ Moreover, it must be kept in mind that the CJEU has generally rejected purely financial concerns as justification for indirect sex discrimination.⁹⁵ This leads to the conclusion that a merely possible or presumed harm is not sufficient, nor is a purely financial harm. This would apply to an employer who argues and provides evidence that they will lose customers if they do not follow the discriminatory preferences of these customers. Pure financial harm is not enough, as this would make equality dependent on the general economic situation. Cloots gives two more reasons why this argument cannot serve as justification for discrimination: first, if it is morally wrong for the employer to discriminate against a worker on the ground of immutable characteristics and fundamental choices, then this wrongfulness does not disappear where the act is based on prejudices and stereotypes of third parties rather than of the employer. Second, an important function of anti-discrimination law is precisely to free employers from this type of pressures and 'regulation outlawing discrimination is therefore essential to liberate undertakings from the discriminatory whims of their customers'.⁹⁶

7 Conclusion

This article analysed the Opinion of AG Rantos in *Wabe* and *Müller*, two cases concerning Muslim women who wanted to wear a headscarf at work for religious reasons but who were prevented from doing so by their employers' neutrality policies.⁹⁷ Former AG Sharpston, to whom these cases were originally assigned, brought out a Shadow Opinion, which contrasts with AG Rantos Opinion in very significant ways.⁹⁸ After a description of the facts and the questions referred to the CJEU, the question whether there was direct or indirect discrimination was examined: AG Rantos held that there was indirect discrimination in both cases, while former AG Sharpston opined that there was likely to be

⁹⁴ Case C-414/16 *Egenberger*, para. 67.

⁹⁵ Case C-77/02 *Erika Steinicke v. Bundesanstalt für Arbeit*, EU:C:2003:458, para. 45.

⁹⁶ E. Cloots, 55 *CMLR* (2018) p. 613. Author refers to C. Sunstein, *Free Markets and Social Justice* (Oxford University Press 1997), p. 151-166 and to the Opinion of Advocate General Poiares Maduro in Case C-54/07 *Feryn*, para. 18. She points out that the findings of the CJEU, in *Bougnaoui*, fit in with this.

⁹⁷ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*.

⁹⁸ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021).

direct discrimination in both cases, especially because the neutrality policy was based on the (stereotypical and prejudiced) wishes of customers. Both point out that this question is ultimately for the referring court to decide.

Neither AG Rantos nor former AG Sharpston really engage with the issue of whether there is indirect gender discrimination, although the latter acknowledges that there could very well be double or triple discrimination (on the grounds of gender, religion and/or ethnicity). Both point out that the referring court in *Wabe*, which asked about possible indirect gender discrimination, did not cite any EU provision on gender discrimination and there was not enough material before the CJEU to analyse this. It was suggested that it would be prudent in cases such as these to challenge the neutrality policy explicitly as indirect discrimination on the grounds of gender, religion and/or racial or ethnic origin, and to set out clearly all material issues.

Because indirect discrimination is not unlawful if it is objective justified, the justification test was examined in detail. It was stressed that, following Article 10 of Directive 2000/78/EC, the burden of proving justification is on the employer who wants to introduce a policy which puts persons with a characteristic covered by the Directive at a particular disadvantage. It was also submitted that any justification brought forward for indirect discrimination must be scrutinised rigorously .

In relation to the legitimate aim, AG Rantos followed the CJEU, in *Achbita*, that the wish of an employer to project an image of neutrality towards customers relates to the freedom to conduct a business, recognised in Article 16 of the Charter; and, that this is, in principle, a legitimate aim. AG Rantos, however, goes further than the CJEU in that he adds that a neutrality policy adopted ‘in order to take account of the wishes of customers’ fell under this.⁹⁹ Contradictions in the opinion of AG Rantos and the tensions between the judgments in *Achbita* and *Bougnaoui* were pointed out.

⁹⁹ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para. 60, 66 and 68.

The neutrality policy in *Wabe* prohibited the wearing of all visible signs of political, ideological or religious beliefs, while the policy in *Müller* only banned prominent and large-scale signs. The referring court in the latter case asked whether such a rule could justify indirect discrimination, and AG Rantos concluded that both policies constituted a legitimate aim, but it was suggested that his reasoning here appeared contradictory. In contrast to the AG's easy acceptance of a neutrality policy as a legitimate aim which can justify indirect discrimination, former AG Sharpston suggested to submit the employer's legitimate aim to a much more rigorous test. It was submitted that the latter was the right approach to avoid adversely affecting the employment opportunities and wider inclusion of people belonging to **especially** vulnerable groups.

In relation to the second part of the justification test for indirect discrimination, the assessment of whether the means used to achieve the legitimate aim were appropriate, it was submitted that, here again, a strict level of scrutiny is applied and that the questions proposed by former AG Sharpston¹⁰⁰ are part of the examination. The last part of the justification test for indirect discrimination, that the means used must be necessary, is a test of proportionality, a test where all issues and interests of both parties are weighed in the balance. It was argued that, contrary to what AG Rantos concluded, all relevant fundamental human rights of both parties need to be taken into account in this proportionality test, which is precisely about balancing these different rights.

It was therefore concluded that all three parts of the justification test need to be scrutinised rigorously. The fact that the CJEU has held that this test must be interpreted strictly and narrowly indicates that equal treatment is the rule, and exceptions to this rule must be scrutinised closely. This is also clear from the interpretation of the appropriateness and necessity tests, which must include considering whether the same legitimate aim can be achieved by means less discriminatory and less restrictive of the rights of the employee.

¹⁰⁰ E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 226 and 237.

The last part of this article addressed the status of national norms giving protection that goes beyond that provided by Directive 2000/78/EC. Both AG Rantos and former AG Sharpston came to the same conclusion: neither the Directive, nor Article 16 of the Charter preclude a national court from applying such national constitutional rules.¹⁰¹ It was submitted that to be successful in showing that an indirectly discriminatory rule is justified, the employer should show evidence of real, tangible harm to their business and that this cannot be purely financial harm. If they do not do so, the rights of the employee should weigh heavier in the balance. Merely stating that not following the discriminatory preferences of customers amounts to economic harm is never enough.

It is now up to the CJEU to decide these cases. The judgments in *Achbita* and *Boungaoui* left many uncertainties¹⁰² which the CJEU will be able to clarify. The CJEU can choose: to protect the fundamental human rights of everyone in the EU by protecting those vulnerable to discrimination on religious or other grounds; and, in doing so, to uphold the founding values of the EU as laid down in Article 2 TEU and in the Charter; to respect religious diversity, as article 22 of the Charter prescribes; and, to work towards a high level of employment, economic and social cohesion and solidarity and the full participation and inclusion of everyone (and that includes people from groups which are especially vulnerable to discrimination, prejudice and stereotyping) in society. Or, the CJEU can make a populist decision and follow AG Rantos by allowing employers to pander to the prejudicial and stereotypical views of their customers and letting the majority in society dictate what religious people can or cannot wear at work. In doing the latter, it would hinder the employment and inclusion of Muslim women, an already vulnerable group, and would push these women even further out of sight. Doing the latter would also go against the judgments in other religious discrimination cases, where the CJEU appears to have given broad protection to the religious persons in question by interpreting

¹⁰¹ Opinion AG Rantos in C-804/18 *Wabe* and C-341/19 *Müller*, para.112; E. Sharpston, 'Shadow Opinion: Headscarves at Work', *EU Law Analysis* (2021), para. 109.

¹⁰² As discussed in E. Howard, 24, 3 *MJECL* (2017), 348-366 and E. Howard, 27, 1 *MJECL* (2019), 1-28.

exceptions to the principle of equal treatment narrowly and scrutinising these closely.¹⁰³ The CJEU should follow this, as the justification of indirect discrimination is such an exception.

¹⁰³ Case C-414/16 *Egenberger*; Case C-68/17 *IR v. JQ*, EU:C:2018:696; Case C-193/17 *Cresco Investigations*.